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PROPOSED STANDARDIZED GENERAL AVIATION INSURANCE POLICY—PILOT CLAUSE AND EXCLUSIONS

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THE TIME has come for aviation insurers to realize that those who buy their product expect to be protected from all the risks of aviation and do not want to be unprotected when their losses occur during certain common factual situations. Automobile insurers have accepted coverage for all risks involved in driving and have long given up attempts to exclude certain categories of risks. It is with this philosophy in mind that the "pilot clause" and the "exclusions" in the recommended standard form policy have been streamlined and held to a minimum.

Many risks can be eliminated in the underwriting department without the need for exclusionary language in the policy. For instance, if a company does not want to insure student pilots, then they should refuse to sell insurance to student pilots and specifically provide in the pilot warranty that no coverage is afforded to student pilots.

On the other hand, if an insurance company wants to insure student pilots, but does not want the risk of liability for passengers carried by student pilots, then passenger liability coverage should not be included in any policy sold to a student pilot or which covers student pilots in the pilot clause. It makes little sense to

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issue a policy to a student pilot which contains passenger liability coverage and then try to avoid coverage under general phrases in other parts of the policy.[1]

EXCLUSIONS

If certain insurance companies do not want the risk of non-instrument rated pilots flying into instrument weather, then they should not sell a policy unless the pilot clause requires an instrument rating. Flight by a non-instrument rated pilot into weather conditions beyond his capabilities is a well recognized risk which should be intentionally accepted or clearly rejected.

While non-instrument rated pilots do not have a monopoly on flying into hazardous weather, the requirement of an instrument rating is at least a clear-cut method of minimizing this risk. It is much easier to administer than attempting to rely on such general phrases as "rated for the flight involved" and then argue that even though the flight originated in visual flight rules (VFR) weather, coverage was suspended each time the aircraft flew into instrument flight rules (IFR) weather conditions unless by "inadvertance." This approach is at best difficult to sustain by proof and has not received judicial acceptance.[2] In fact, *Glover v. National Insurance Underwriters*[3] forecloses any opportunity to successfully invoke such a provision in this type of situation.

While these risks should be accepted in the first instance as inherent in aviation, if such a risk is to be excluded, it should be excluded by specific and prominent language: "There is no coverage under this policy if the aircraft is being operated by a non-instrument rated pilot in weather conditions below VFR minimums at the time of or immediately prior to the loss." Such forthright language greatly improves the chances that both the insured and insurer will know exactly what risks are covered and what risks are not covered prior to any loss.

If an insurer wants to exclude coverage because the pilot's medi-

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[1] *See* Ranger Ins. Co. v. Culberson, 454 F.2d 857 (5th Cir. 1971), *cert. denied*, 407 U.S. 916 (1972).

[2] *See, e.g.*, Glover v. National Ins. Underwriters, 545 S.W.2d 755 (Tex. 1977); National Ins. Underwriters v. King Craft Custom Prod., Inc., 368 F. Supp. 476 (N.D. Ala. 1973), *aff'd per curiam*, 488 F.2d 1393 (5th Cir. 1974).

[3] 545 S.W.2d 755 (Tex. 1977).

cal certificate is out of date, it can and should clearly so state. Those who know how to spell "medical certificate"[4] have had better success than those who don't,[5] and at least the insured may be forewarned.

The "unlawful purpose" exclusion has been rephrased so as to clarify its legitimate intent and to avoid situations such as *Roach v. Churchman*,[6] where the insurer unsuccessfully contended that the violation of a Federal Air Regulation, and presumably any other governmental authority, constituted an illegal or unlawful flight, thus avoiding coverage under this exclusion. While the high risk involved in smuggling activities such as occur along the Mexican border would justify the exclusion of this risk, more specific exclusionary terms such as those recommended should be used.

PILOT CLAUSE

It will be noted that the pilot clause contains no requirement for a current medical certificate. Such a certificate is no longer required by certain major underwriters.[7] They realize that as a practical matter this risk is minimal. A current medical certificate does not assure the physical condition of the pilot on any given occasion, and in most instances where a pilot was operating an aircraft without a current medical certificate, it was inadvertent and in no way related to the loss.

Also absent from the pilot clause of the recommended policy is the requirement for "logged" hours. This is eliminated in recognition of the fact that it is the actual experience of the pilot that relates to the risk and not whether he has done his "paper work" and actually recorded his experience in a log book. Likewise, "logged" time can be padded and offers no real guarantee of the pilot's ability.

In addition, the manner of determining hours is not standard. For that reason, the term "flight experience" was selected to avoid

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[4] Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co., 189 Neb. 610, 204 N.W.2d 162 (1973).

[5] Insurance Co. of N. America v. Maurer, 505 S.W.2d 931 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.); Royal Indem. Co. v. John F. Cawrse Lumber Co., 245 F. Supp. 707 (D. Or. 1965).

[6] 431 F.2d 849 (8th Cir. 1970).

[7] *See, e.g.*, Associated Aviation Underwriters' "Golden Wing" policy.

such cases as *Security Mutual Casualty Co. v. Luthi*,[8] which involved the question of whether or not the pilot clause required "logged time" determined by the "block-to-block" method or the "flight time" method. The term "logged flying time as pilot in command" has also created controversy.[9]

It might be that a minimum hour requirement could be eliminated, except for the time required for familiarization with the model aircraft involved, since any determination of ability based solely on hours is uncertain and at best arbitrary. It's not how many hours you have, it's what you did in those hours that counts. Some pilots with 200 hours of experience are better than some with 2000 "logged" hours. If the policy covers multi-engine aircraft, there would be more justification for requiring a minimum amount of flight experience in multi-engine aircraft, as total experience would not necessarily measure the experience level in this type of aircraft.

Insofar as "named insureds" are concerned, the pilot's qualification and ability could best be determined by the underwriting department through requirements of check rides, the presentation of a log book and license, or a record check with the Federal Aviation Administration in Oklahoma City. As a matter of expediency, the insurer could be given thirty or sixty days after the policy was written to make this determination, and thereafter the qualifications would be "uncontestable," similar to certain risks in life insurance policies.

The phrase "effective certificate" was taken from F.A.R. § 61.19(e) which provides, "Any pilot certificate or flight instructor certificate issued under this part ceases to be effective if it is surrendered, suspended, or revoked."[10] Therefore, the pilot clause is satisfied as long as the pilot's certificate has not been so affected.

Today aircraft are not usually operated without an airworthiness certificate or for purposes requiring a special permit or waiver, and such outmoded language of bygone days should be eliminated. If an insurer does not want to insure aircraft that can be operated on water, then this can be made clear in the description of the aircraft covered or in other specific and prominent language.

Most insureds would expect to be protected under "Property

[8] 303 Minn. 161, 226 N.W.2d 878 (1975).

[9] Utica Mut. Ins. Co. v. Emmco Ins. Co., 243 N.W.2d 134 (Minn. 1976).

[10] 14 C.F.R. § 61.19(e) (1977).

Damage" coverage for legal liability incurred as the result of damage to property belonging to others under nearly all circumstances and particularly when it was in the insured's possession or control. This risk cannot be great and should be accepted by the insurer, since it falls within the expectations of the ordinary insurance consumer.

Such risks as war or atomic explosion are so remote that they do not warrant the space required to include them on the policy or the time for comment in this presentation.

In summary, the insurer, as writer of the contract, assumes an obligation to state clearly and prominently those risks which are insured and those risks which are not insured. Public policy discourages denial of coverage by insurers. Whenever there is any doubt as to whether coverage is provided by the terms of the policy, the insured claiming under the policy will be allowed to recover, provided his claim is made under a reading of the policy language which is not unreasonable.[11]

[11] Continental Cas. Co. v. Warren, 152 Tex. 164, 254 S.W.2d 762 (1953).